PLAZA SINGAPURA (PTE.) LTD. v. SHIZUOKA YAJIMAYA (SINGAPORE) PTE. LTD. (COSDEL (S) PTE. LTD., CLAIMANTS)

[O.C.J. (Lai Kew Chai J.) 2 February 1988]

[Singapore – Originating Summons No. 209 of 1987; S/C No. 1504 of 1987]

Distress – Claim for arrears of rent – Whether goods of claimants should be released – Whether defendants reputed owners – Question of fact – Distress Act (Cap. 84, 1985 Ed.), ss. 10 & 12.

The plaintiffs applied for a writ of distress against the defendants, who ran a bookshop, for the recovery of arrears of rent. On 23 February 1987, the writ of distress was executed by the sheriff and among the goods distrained were goods allegedly owned by the claimants but which were consigned to the defendants for sale in the tenanted premises. The claimants applied for release of their goods.

The two issues that the court had to decide were, first, whether the claimants were entitled to apply for a release of their goods under section 10 of the Distress Act and, secondly, even if the claimants qualify under section 10(1)(c) of the Act, whether the goods were put in the possession and disposition of the defendants by the claimants under circumstances that the defendants were the "reputed owners thereof".

Held: (1) the claimants were entitled to apply under section 10(c) of the Distress Act for the release of the goods;

(2) it was not realistic or legitimate in the interest of the trade in all the circumstances to infer that the defendants were the reputed owners of the claimants' goods;

(3) the claimants' goods were released.

Cases referred to:

(1) *Lyons* v. *Elliot* (1875-76) 1 Q.B.D. 210 (refd).
(2) *Re Couston, ex parte Watkins* (1873) 8 Ch. App. 520 (cited).

DISTRESS PROCEEDINGS.

David Hew for the claimants.
Gan Hian Chye for the plaintiffs.
Choi Yok Hung (Miss) for the defendants.

Cur. Adv. Vult.

Lai Kew Chai J.: In February 1987, the plaintiffs applied for a writ of distress against the defendants, who ran a bookshop, for the recovery of arrears of rent amounting to $53,380.46 in respect of units 03-39 to 03-47 Plaza Singapura, 68 Orchard Road, Singapore 0923 (hereinafter referred to as "the tenanted premises"). On 23 February 1987, the writ of distress was executed by the sheriff and among the goods distrained were goods allegedly owned by the claimants, but which were consigned to the defendants for sale in the tenanted premises. On 6 March 1987, the claimants by summons-in-chambers applied for the release of their goods which were said to have a retail value of $132,971.44.

The question whether the claimants are entitled to the release of the goods has to be resolved on a construction of section 10(1) and (2) and section 12(a) of the Distress Act (Cap. 84, 1985 Ed.) and on a consideration of the common law which has been codified or amended by the aforesaid sections and of the relevant authorities.

The relevant portions of the aforesaid sections read as follows:

> "10.(1) Where any movable property of –
>
> (a) any under-tenant;
> (b) any lodger; or
> (c) any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,
>
> has been seized under a writ of distress issued to recover arrears of rent due to a superior landlord by his immediate tenant, such under-tenant, lodger or other person aforesaid may apply to a judge to discharge or suspend the writ, or to release a distrained article."

It is not in dispute that the claimants are neither the "under-tenant" nor "lodger" of the defendants. However, whether the claimants are the "any other person" within the ambit of section 10(1)(c) of the Act is in issue and I shall return to it.

An applicant for release of the distrained article, however, has to satisfy the court that the tenant "has no right of or beneficial interest" in the distrained article.

Section 10(2), so far as material for present purposes, provides:

> "No order shall be made unless such ... other person aforesaid satisfies the court that the tenant has no right of property or beneficial interest in the ... goods and that such goods ... are the property or in the lawful possession of such ... other person aforesaid; ..."

The possible right of an applicant to an order under section 10 of the Act may be lost if his goods fall into any of the descriptions set out in

section 12 of the Act. Section 12(a), so far as material for present purposes, provides:

"The provisions of section 10 shall not apply to –

(a) ... goods in the possession, order, or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof; ..."

It is now convenient to contrast these statutory provisions with the common law under which it was the general rule that all personal chattels found upon the premises in respect of which the rent has been in arrears, whether they did not belong to the tenant or in fact they belonged to a stranger, could be distrained. This situation was made worse as described by Blackburn J. at p. 213 in *Lyons* v. *Elliot*[1] as follows:

"The general rule at common law was that whatever was found upon the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid or the service performed. This state of things produced no harm, because at common law the landlord, not being able to sell the distress, generally gave up the goods as soon as he found they were not the tenant's, as his continuing to hold them would not induce the tenant to pay. But in the reign of William and Mary a very harsh and unjust law was passed, by which the right was given to the landlord to sell any goods seized and to apply the proceeds to the payment of the rent unless the tenant or the owner of the goods first paid it, and this held out a great temptation to a landlord to take the goods of a stranger although he knew they were not the tenant's."

This unsatisfactory situation was progressively put on a fairer basis and in England, there is a procedure laid down in the Law of Distress Amendment Act 1908 that any person not being a tenant of the premises and not having any beneficial interest in the tenancy may apply and obtain a discharge of the writ of distress and a release of his goods. Our Distress Act (Cap. 84, 1985 Ed.) is similar in material respects to the Law of Distress Amendment Act 1908.

The limited power of a landlord to levy distress on all goods found on premises let out by him which do not belong to his tenant and the circumstances under which the landlord may even lose such limited power of distress are summarized in the first portion of para 250 of 13 *Halsbury's Laws of England*, 4th Ed., in the following terms:

"250. *Exceptions to common law rule.* The common law rule that a landlord could distrain for rent on all goods on the demised premises, even though not the property of the tenant, has been so encroached upon that it hardly exists as a practical proposition of law. As already mentioned, exceptions have been grafted on to the rule in the interests of trade, husbandry and public convenience, and, further, a landlord may by his own act or conduct be estopped from setting up a right to seize the property of a third person. Thus, a landlord cannot distrain on the goods of a third person brought on the demised premises by the landlord himself or with his consent, and by his conduct he may be held to have waived his right of distress on a stranger's goods, an agreement not to distrain being implied from the circumstances where necessary."

The issues

There are two issues raised in these proceedings. First, the plaintiffs say that the claimants do not qualify under section 10(1)(c) of the Act in that the claimants in the circumstances of this case cannot properly be described as "not having any beneficial interest in any tenancy of the premises or of any part thereof ..." They therefore say that the claimants are not entitled to apply for a release of their goods under section 10 of the Act. Secondly, the plaintiffs contend that, even if the claimants qualify under section 10(1)(c) of the Act, the goods were put in the possession and disposition of the defendants by the claimants under circumstances that the defendants were the "reputed owner(s) thereof". This issue whether the defendants were the reputed owners is a question of fact and its answer depends on the evidence in this case.

The first issue

With regard to this issue, learned counsel for the plaintiffs submitted that on principle, there being no authority, that the claimants had derived a profit, benefit or advantage out of their contract with the defendants and that, accordingly, the claimants were not entitled to the privilege conferred by section 10 of the Act. On the evidence, it was proved that the claimants had by September 1985 entered into a contract with the defendants under which the claimants had "leased" some 950 sq. ft. of the tenanted premises for a period of two (2) years from 15 September 1985 at the "rent" of $4,560 per month, subject to revision which in turn depended on what was imposed by the plaintiffs as the landlord. The claimants, as the plaintiffs contend, had a licence to send their salesgirls to sell their goods and that, therefore, they were licensees coupled with an equity.

I am not able to accept the plaintiffs' submission. A correct analysis is that the defendants had agreed to grant a licence to the claimants to display their goods, to allow their salesgirls to attend to their sales, with the defendants retaining possession over the goods. The defendants had to account to the claimants all proceeds of sales which, after

deducting the "rent", had to be paid over to the claimants by the 10th day of the month following the month in which the sales were effected. By clause 7 of the contract, the defendants had agreed to insure the claimants' "merchandize and fixtures in the store against fire and theft". Both parties had also agreed on how to apportion the losses of the goods after a year-end stock count. By clause 10, it was agreed that any loss in excess of 3% of the retail value of the goods shall be borne by the two parties equally.

In the light of the arrangements made, it seems to me wrong in law to describe them as a "sale and buy back" and also wrong in law to say that the claimants had a "beneficial interest" in the tenancy. They were merely licensees of a portion of the defendants' bookshop in which they were allowed to display goods for sale. To assist the sales, the claimants were allowed to send their employees. But the defendants agreed to account for the proceeds of sale and for the safety of the goods as bailees, with the defendants retaining possession of the goods. Accordingly, the claimants were entitled to apply under section 10(c) for the release of the goods.

The second issue

This brings me to the second issue as to the "reputed ownership" of the goods. It is not in dispute that the goods were put in the possession and disposition of the defendants. The sole question is whether they were in possession and disposition "under such circumstances that [the defendants were] the reputed owner thereof".

Lord Selbourne L.C. had said many useful things in *Re Couston, ex parte Watkins*[2] at pp. 528 and 529 on what amounts to "reputed ownership" and they bear repetition. The following passage must be read in the context of section 15(5) of the English Bankruptcy Act 1869:

> "The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief, either of all creditors, or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods. It is enough for the doctrine if those goods are in such a situation as to convey to the minds of those who know their situation the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. It is not at all necessary to examine into the degree of actual knowledge which is possessed, but the court must judge from the situation of the goods what inference as to the ownership might be legitimately drawn by those who knew the facts. I do not mean the facts that are only known to the parties dealing with the goods, but such facts as are capable of being, and naturally would be, the subject of general knowledge to those who take any means to inform themselves on the subject."

The relevant facts as I have found them are as follows. By a lease dated 23 October 1985, the plaintiffs let the tenanted premises of about 861 sq. ft. to the defendants, who were booksellers and who have been wound up compulsorily, for a term of three years from 25 January 1985. By an arrangement entered into between the claimants and the defendants, the claimants were allowed to display for sale "Hallmark" cards and other gift items in a part of the tenanted premises. The arrangement was recorded in the claimants' letter dated 31 July 1985 which was duly accepted on behalf of the defendants. This arrangement did not amount to a sub-letting, it being properly conceded that the claimants did not have exclusive possession of any part of the tenanted premises. I have earlier set out some of the material clauses.

In fact after the arrangements were made, the goods of the claimants were displayed in open shelves provided by the claimants. As will be seen from the photographs exhibited the layout, design, colour scheme and general appearance of the shelves clearly indicated that they belonged to the claimants, inasmuch as they were different from those of the defendants in the tenanted premises. All the goods carried price-tags bearing the name "KALM's" which was the business name of the claimants' retail chain. The sale of the claimants' goods were attended to by one or two promoters employed by the claimants. They were distinguished and distinguishable from the defendants' salesgirls by the different uniform worn. However, the sales of the claimants' goods were transacted through the cashiers of the defendants. These cashiers used a special code assigned for the sale of the claimants' goods. They collected the proceeds of sale and would issue receipts bearing the defendants' names. The proceeds of sale were accounted by the defendants to the claimants in the way and at the appointed times which I had set out earlier.

The claimants have also produced evidence of similar consignment arrangements entered into with other retail outlets in Yaohan, Metro and C.K. Tang which are well-known department stores in Singapore. I am prepared to take judicial notice of the fact that these consignment arrangements are very common in our metropolis which boasts of many department stores and retail out-

lets. Any well-informed landlord would know of these trade practices.

In these circumstances, effect must be given to these consignment arrangements and no landlord can be heard to say that they had let their premises in the knowledge or expectation that they could levy distress on the goods of these consignors. I find it is not at all realistic or legitimate in the interest of the trade in all the circumstances to infer that the defendants were the reputed owners of the claimants' goods.

Finally, the plaintiffs contend that the claimants were out of time in filing their application contrary to Order 75 rule 5(1) of the Rules of Supreme Court 1970. I propose to excuse the short delay.

There will therefore be an order in terms of prayers 1 and 2 of the claimants' application. Their goods are released. The plaintiffs are ordered to pay the costs of the claimants and defendants.

Order accordingly.

Solicitors: *Tang & Tan; Allen & Gledhill; Chor Pee & Co.*

MALAYSIAN REPORTS

SIVANENDRAN S/O V. MARKANDOO & ANOR. v. DR. MAHENDRAN A/L V. MARKANDOO

[S.C. (Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 24 March 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 429 of 1986]

Civil Procedure – Probate action – Application for interlocutory injunction – Strong prima facie case to be shown against administrators – R.H.C. 1980, O. 71 & O. 72.

Succession – Probate and administration – Probate action – Necessity to comply with O. 71 and O. 72 of R.H.C. 1980.

In this case, the respondent brought an action against the administrator and administratrix of his deceased father's estate. After issuing the writ, he took out a summons applying for a interlocutory order against the administrator and administratrix of the estate and for the appointment of a receiver and other ancillary relief. The learned judge of the High Court made the order in terms. The appellants, the administrator and administratrix of the estate, appealed.

Held, allowing the appeal: (1) probate actions, whether contentious or non-contentious, should comply with Orders 71 and 72 of the Rules of the High Court 1980;

(2) a strong *prima facie* case is required to induce a court to grant an interlocutory injunction against an administrator or administratrix of an estate and thereby displacing his/her authority. There must be some evidence of actual misconduct or fraud or immediate danger of loss, for the court is reluctant to interfere with the work of an administrator or administratrix except in special circumstances;

(3) in this case, a strong *prima facie* case had not been made out against the appellants and therefore the appeal must be allowed and the interlocutory injunction and the appointment of the receiver set aside.

Case referred to:

(1) *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396 (refd).

G. Sri Ram (*S. Kanawagi* with him) for the appellants.

Raja Abdul Aziz Addruse (*Dennis Appaduray* with him) for the respondent.

Cur. Adv. Vult.

Seah S.C.J. (delivering the judgment of the court): For the purpose of this appeal, we would regard the writ taken out by the plaintiff, Dr. Mahendran a/l V. Markandoo (the respondent herein), as probate action albeit the procedure laid down in Order 72 of the Rules of the High Court 1980 has not been complied with. We would like